Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

Planet Earth Foundation d/b/a Planet Earth Media

Petitioner

v.

~~New York~~ University

Respondent

PETITION FOR WRIT OF CERTIORARI

March 22, 2006

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Of Counsel:
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Leslie K. Nguyen

QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Second Circuit erred when it failed to hold as matter of law that it is copyright infringement to display a copyrighted work in its entirety for a commercial purpose, in conflict with the holdings of this Court.

2. Whether the Court of Appeals for the Second Circuit created a conflict of law with the Court of Appeals for the Ninth Circuit in holding that it is not copyright infringement to display a copyrighted work in its entirety for a commercial purpose.

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceedings in the United States Court of Appeals for the Second Circuit were Petitioners Planet Earth Foundation d/b/a Planet Earth Media, and Lisa Blume and John Keith Blume a/k/a Keith Blume,[1] and Respondent New York University. Petitioner is a not-for profit corporation organized under the laws of Washington. It has no corporate parents, nor has it issued shares or securities.

[1] Lisa Blume and Keith Blume were named as parties in the District Court but no relief was granted against them.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The summary order of the United States Court of Appeals for the Second Circuit is unreported and set forth in the Appendix at A-6. The judgment of the United States District Court for the Southern District of New York is set forth in the Appendix at A-2. An order denying a motion for judgment as a matter of law and/or for a new trial without opinion of the United States District Court for the Southern District of New York is unreported and set forth in the Appendix at A-4.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was issued on December 23, 2005. This Court has jurisdiction over this petition under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

17 U.S.C. § 106(5):

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

* * *

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion

picture or other audiovisual work, to display the copyrighted work publicly.

17 U.S.C. § 107:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

* * *

STATEMENT OF THE CASE

Respondent New York University ("NYU") brought a breach of contract action against petitioner Planet Earth Foundation d/b/a Planet Earth Media ("Planet Earth"), and other claims against Planet Earth, Lisa Blume and John Keith Blume a/k/a Keith Blume which were dismissed by the District Court or withdrawn, in which Planet Earth counterclaimed for breach of contract and copyright infringement. The breach of contract and copyright infringement claims arose from a 2002 agreement ("Agreement") entered into between NYU and Planet Earth.

The District Court had jurisdiction over the underlying action under 28 U.S.C. §§ 1331, 1332 and 1338. The case was tried to a jury from January 10 through January 18, 2005. At the conclusion of the trial, the jury returned a verdict finding that Planet Earth had breached the Agreement. The jury verdict also found that NYU had not breached the Agreement[2] and that NYU had not infringed Planet Earth's copyright in a television spot created by Planet Earth pursuant to the Agreement. On February 15, 2005, the District Court entered Judgment against Planet Earth amounting to a portion of what was paid under the Agreement.

After entry of Judgment, Planet Earth brought a motion for judgment as a matter of law or, in the alternative, for a new trial pursuant to Rules 50 and 59, Fed. R. Civ. P., because the evidence at trial did not support the jury's finding that there was no copyright infringement when NYU displayed the entire television spot at a fundraiser. On March 8, 2005, the District Court issued an Order without opinion summarily denying Planet Earth's post-trial motion. Planet Earth timely appealed the Judgment to the Court of Appeals for the Second Circuit.

The Court of Appeals for the Second Circuit affirmed the judgment of the District Court. The Court found that the evidence supported the jury's finding of fair use under the four-factored analysis prescribed by 17 U.S.C. § 107, noting that whether NYU's display of copyrighted material at a fundraiser was of a commercial nature was an issue for the jury to decide.

In affirming the District Court's judgment, the Second Circuit in effect ruled that it is not copyright infringement to display a copyrighted work in its entirety for a commercial purpose, which is in conflict with the holdings of this Court and the Court of Appeals for the Ninth Circuit.

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[2] The breach of contract issue is not before this Court.

I. The District Court's Judgment

NYU displayed Planet Earth's copyrighted work in its entirety for commercial purposes without Planet Earth's authorization.

Under the Agreement, Planet Earth created a television spot called "Remember", the subject of the copyright infringement counterclaim, as part of a public service campaign for NYU's Child Study Center in an effort to increase public awareness about child mental health issues in the wake of September 11th. Planet Earth received a copyright registration from the Register of Copyrights, Reg. No. PA-1-124-660, which covers the "Remember" television spot.

NYU displayed the "Remember" television spot in its entirety without Planet Earth's authorization and raised $2.3 million gross in donations at NYU's 2002 Child Advocacy Awards Dinner. There was no dispute at trial that at least some of that money was given to NYU by donors after the dinner. There was also no dispute at trial that the "Remember" spot was not shown to educate the public about children's mental health issues, but rather to show donors the work being done by the Child Study Center, so that donors would contribute money to NYU. NYU's use of the "Remember" spot was purely for commercial purposes.

The jury found no copyright infringement but made no finding concerning fair use. Planet Earth filed post-trial motions under Rules 50 and 59, F.R.Civ.P., because as a matter of law, there could be no fair use and, therefore, there must be copyright infringement since NYU displayed the television spot for commercial purposes without Planet Earth's authorization. Those motions, however, were summarily denied without opinion by the District Court.

II. The Second Circuit's Determination

The Second Circuit reviewed *de novo* the District Court's denial of Planet Earth's Rule 50 motion and reviewed for abuse of discretion the denial of Planet Earth's Rule 59 motion. The Second Circuit affirmed the District Court's judgment that there was no copyright infringement. Specifically, the Second Circuit held that the evidence at trial supported a jury finding of fair use under the four-factored analysis prescribed by 17 U.S.C. § 107, although there had been no such finding. The Second Circuit further held that whether NYU's display of copyrighted material at its fundraiser was of a commercial nature was an issue for the jury to decide, although there had been no such finding. This holding is contrary to the holdings of this Court and the Court of Appeals for the Ninth Circuit that displaying a copyrighted work in its entirety for a commercial purpose is as a matter of law copyright infringement.

REASONS FOR GRANTING THE WRIT

I. Certiorari Should Be Granted Because There Was Copyright Infringement As A Matter Of Law By Displaying An Entire Copyrighted Work For A Commercial Purpose.

The District Court's and Court of Appeals' decisions in this case drive a wedge into the heart of the media and communications industries. They allow one to use an entire copyrighted work for a commercial purpose without compensation to the copyright owner. Thus, the issue presented is of substantial importance to authors, artists and businesses.

In this case, to succeed on its claim of copyright infringement, Planet Earth only needed to establish that it owned the copyright in the work and that NYU displayed it

without Planet Earth's authorization or consent. Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991). There was no dispute at trial that Planet Earth owned a copyright in the "Remember" television spot. As the copyright owner, Planet Earth has the exclusive right to reproduce, distribute, and publicly display copies of the work. 17 U.S.C. § 106. Furthermore, there was no dispute at trial that Planet Earth never authorized NYU to display the copyrighted work at its fundraiser. Planet Earth made out a *prima facie* case of copyright infringement.

To rebut this *prima facie* case of copyright infringement, NYU had to prove a fair use defense. Section 107 of the Copyright Act provides that, notwithstanding the provisions of sections 106, the fair use of a copyrighted work for purposes such as criticism, comment, news reporting, teaching, scholarship, or research is not an infringement of copyright. 17 U.S.C. § 107. In addition, section 107 specifies four factors courts must consider in determining whether the use in a particular case is a fair use:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107. The four factors favored Planet Earth as supported by evidence at trial, and the Second Circuit erred by not finding copyright infringement as a matter of law.

If a work is used for a commercial purpose, the use is presumptively unfair. Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 449-451 (1984). The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material

without paying the customary price. Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 562 (1985). The undisputed facts showed that NYU's fundraiser had the commercial purpose of raising money for NYU, and that NYU received money in connection with the fundraiser after displaying the "Remember" television spot at the fundraiser. There was no basis for the jury to find that the use was not commercial. The unauthorized display of an entire copyrighted work at a fundraiser for monetary gain, even by a not-for-profit organization like NYU, is for a commercial purpose. Without contrary evidence that the use was fair, NYU's use of Planet Earth's entire copyrighted television spot at the fundraiser constituted infringement. Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1152 (9th Cir. 1986). The lower courts' failure to recognize NYU's infringing conduct as such was contrary to law and to the public interest.

II. Certiorari Should Be Granted Because The Second Circuit's Decision Created A Conflict With A Ninth Circuit Decision That There Is Copyright Infringement As A Matter Of Law By Displaying An Entire Copyrighted Work For A Commercial Purpose.

In Moral Majority, the Ninth Circuit held that the use of copyrighted material to raise money is presumptively unfair, and therefore constitutes infringement. In that case, the Court held that the presumption of unfairness was overcome because the copyrighted work was used to rebut a personal attack and to make a political comment about the nature of the material. Id. at 1153. In Moral Majority, the defendant used the copyrighted material to make a statement about pornography, the publisher of the material and the content of the copyrighted material itself. The Court held that "[t]here was no attempt to palm off the parody as that of the Defendants." Id.

This distinction was not applicable here. NYU used the copyrighted material for the purpose of demonstrating the activities of NYU's Child Study Center so that attendees would donate money to NYU's Child Study Center. Unlike Moral Majority, there was no evidence that NYU credited Planet Earth as the copyright owner, even though the testimony was clear that Planet Earth already had objected to NYU's use of the copyrighted material for other purposes. NYU failed to present any evidence that its use of the copyrighted material was a "fair use." NYU had the burden of doing so, and it failed to meet that burden. Because there was no legally sufficient evidence for a reasonable jury to render a verdict for NYU, the Second Circuit and the District Court erred for failing to find copyright infringement as a matter of law.

The decision of the Second Circuit in this case has created a conflict with the decision of the Ninth Circuit in Moral Majority. That conflict can only be resolved by a decision of this Court.

CONCLUSION

For the forgoing reasons, Petitioner submits that this Court should grant certiorari in this case to review the holding of the Second Circuit affirming the District Court's denial of judgment as a matter of law for copyright infringement.

Respectfully submitted,

March ___, 2006

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Planet Earth Media

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Leslie K. Nguyen

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEW YORK UNIVERSITY,	
Plaintiff,	
	03 **CIVIL** 4919 (LLS)
-against-	
	JUDGEMENT
PLANET EARTH FOUNDATION d/b/a, PLANETT EARTH MEDIA, LISA BLUME, and JOHN KEITH BLUME a/k/a KEITH BLUME,	
Defendants.	

A Jury Trial before the Honorable Louis L. Stanton, United States District Judge, having begun on January 10, 2005, and at the conclusion of the trial, the jury having rendered a verdict in favor of the plaintiff in the amount of $562,500.00; the Court, thereafter, on February 4, 2005, having issued its Order directing the Clerk to award to plaintiff pre-verdict interest in the amount of $102,498.29, plus interest at the rate of $163.97 per day from January 18, 2005 to date of entry of the judgment of $4,591.16, denying plaintiff's application for attorney's fees, and directing the Clerk to enter judgment in accordance with the jury's verdict, together with interest as directed above, and costs and disbursements of the action, it is,

ORDERED, ADJUDGED AND DECREED: That the plaintiff have judgment in the total sum of $669,589.45 as

against the defendants with costs and disbursement and plaintiff's application for attorney's fee is denied.

DATED: New York, New York
February 15, 2005

J. Michael McMahon
Clerk of Court

BY: /s/
Deputy Clerk

This document was entered on the docket on February 15, 2005.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEW YORK UNIVERSITY,	:	
	:	Civil Action No.
Plaintiff,	:	03 CV 4919 (LLS)(GWG)
PLANET EARTH FOUNDATION d/b/a PLANET EARTH MEDIA, LISA BLUME, and KEITH BLUME,	:	
Defendants.	:	

DEFENDANT'S NOTICE OF MOTION AND MOTION FOR JUDGMENT AS A MATTER OF LAW OR IN THE ALTERNATIVE, FOR A NEW TRIAL

To: R. Brian Black, Esq.
Hogan & Hartson, L.L.P.
875 Third Avenue
New York, New York 10022

Attorneys for Plaintiff

PLEASE TAKE NOTICE that at a date to be determined by the Court at the United States District Court for the Southern District of New York, United States Courthouse, 500 Pearl Street, New York, New York 10007, Defendant Planet Earth Foundation (hereinafter "Planet Earth"), will move this Honorable Court for an Order

granting judgment as a matter of law or, in the alternative, a new trial, under Rules 50 and 59, F.R.Civ.P.

The foregoing motion is based upon the facts adduced at trial and the facts and authorities cited in the Memorandum In Support of Defendant's Motion For Judgment As A Matter Of Law Of, In The Alternative, For A New Trial, submitted herewith.

Dated:
February 22, 2005

Respectfully submitted,
COOPER & DUNHAM LLP

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Attorneys for the Defendant
Planet Earth Foundation

This motion is denied.
So ordered.

March 8, 2005
/s/Louis L. Stanton

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 23rd day of December, two thousand and five.

PRESENT:

HON. JAMES L. OAKES,
HON. GUIDO CALABRESI,
HON. RICHARD C. WESLEY,
Circuit Judges.

NEW YORK UNIVESITY,
Plaintiff-Counter-Defendant-Appellee,

v. No. 05-1832-cv

PLANET EARTH FOUNDATION, doing business as Planet Earth Media,
Defendant-Counterclaimant-Appellant.

LISA BLUME,
Defendant.

JOHN KEITH BLUME, also known as Keith Blume,
Defendant-Counterclaimant

For Appellant: NORMAN H. ZIVIN (Robert T. Maldonado, *on the brief*), Cooper & Dunham LLP, New York, N.Y.

For Appellee: R. BRIAN BLACK (Dori Ann Hanswirth, Hogan & Hartson L.L.P., New York, N.Y., and Ada Meloy, New York University, New York, N.Y., *on the brief*), Hogan & Hartson L.L.P., New York, N.Y.

Appeal from a final decision of the United States District Court for the Southern District of New York (Stanton, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED.**

At the conclusion of trial, a jury awarded Plaintiff-Counter-Defendant-Appellee New York University ("NYU") $562,000 in damages, plus interest, on its breach of contract claim against Defendant-Counterclaimant-Appellant Planet Earth Foundation ("Planet Earth"), and found NYU not liable

on Planet Earth's counterclaims for breach of contract and copyright infringement. Planet Earth moved, pursuant to Federal Rule of Civil Procedure 50, for judgment as a matter of law, and moved in the alternative, pursuant to Federal Rule of Civil Procedure 59, for a new trial. The district court (Stanton, *J.*) denied the motion. Planet Earth appeals from the judgment of the district court and from all related orders and rulings.

We assume the parties' familiarity with the facts, the procedural history, and the specification of issues on appeal.

Appellants argue, *inter alia,* that the evidence presented was legally insufficient to support the jury's verdict. The standards for setting aside a jury verdict for insufficiency of evidence, however, are not easily met. Judgment as a matter of law should be granted "only if there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheet surmise and conjecture, or such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded men could not arrive at a verdict against the moving party." *Yurman Design, Inc. v. PAJ, Inc.*, 262F.3d 101, 108 (2d Cir. 2001) (quoting *Diesel v. Town of Lewisboro*, 232 F.3d 92, 103 (2d Cir. 2000)) (internal quotation mark omitted). Similarly, a new trial should be granted on the grounds that the verdict was against the weight of the evidence only where "the jury has reached a seriously erroneous result or the verdict is a miscarriage of justice." *Farrior v. Waterford Bd. Of Educ.*, 277, F.3d 633, 634 (2d Cir. 2002) (quoting *DLC Mgmt. Corp. v. Town of Hyde Park,* 163 F.3d 124, 133 (2d Cir. 1995)) (alteration omitted). We review *de novo* the district court's denial of a Rule 50 motion, *Yurman,* 262 F3d at 108, and we review for abuse of discretion the denial of a Rule 59 motion, *Munafo v. Metro. Transp. Auth.*, 381 F.3d 99, 105 (2d Cir. 2004).

Here, the record contains sufficient evidence to support the jury's verdict, both with respect to NYU's successful

breach of contract claim, and with respect to Planet Earth's unsuccessful copyright infringement counterclaim. The evidence supports a finding that Planet Earth breached the contract by demanding extra compensation as a condition of producing the public service announcements that it had contracted to provide. *See REA Express, Inc. v. Interway Corp.*, 538 F.2d 953, 955 (2d Cir. 1976). As to the copyright infringement claim, the evidence also supports the jury's finding of fair use, under the four-factored analysis prescribed by statute. *See 17* U.S.C. § 107. While Planet Earth vehemently argues, for instance, that NYU's display of copyrighted material at a fund-raiser was of a commercial nature, *see* 17 U.S.C. § 107(1), this issue is the jury's to decide.

Planet Earth also alleges a number of errors by the trial court, relating to evidentiary rulings, jury instructions, and other matters. Planet Earth objected at trial to some of these ruling, but not to all of them. When claims of error have been preserved by contemporaneous objections, faulty rulings warrant a new trial only if the constituted a "clear abuse of discretion" and were "clearly prejudicial to the outcome of the trial." *Marcic v. Reinauer Transp. Cos.*, 397 F.3d 120, 124 (2d Cir. 2005). When no contemporaneous objection was made, a new trial is warranted only if there was "plain error" that was "so serious and flagrant that it goes to the very integrity of the trial." *Id.* "The burden of demonstrating prejudice requiring reversal rests with the party asserting error." *Hygh v. Jacobs*, 961 F.2d 359, 365 (2d Cir. 1992); *see also Marcic*, 397 F.3d at 124. Because Planet Earth has not shown the requisite harm, we reject its claims of error without determining whether the challenged ruling were, in fact, improper.

We have considered all of Planet Earth's arguments and find them to be without merit.

Accordingly, we AFFIRM the judgment of the district court.

For the Court,
ROSEANN B. MACKECHNIE,
Clerk of Court

by: /s/_____
Oliva M. George, Deputy Clerk